

Ontario's Environmental Bill of Rights

User's Guide



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Acknowledgements

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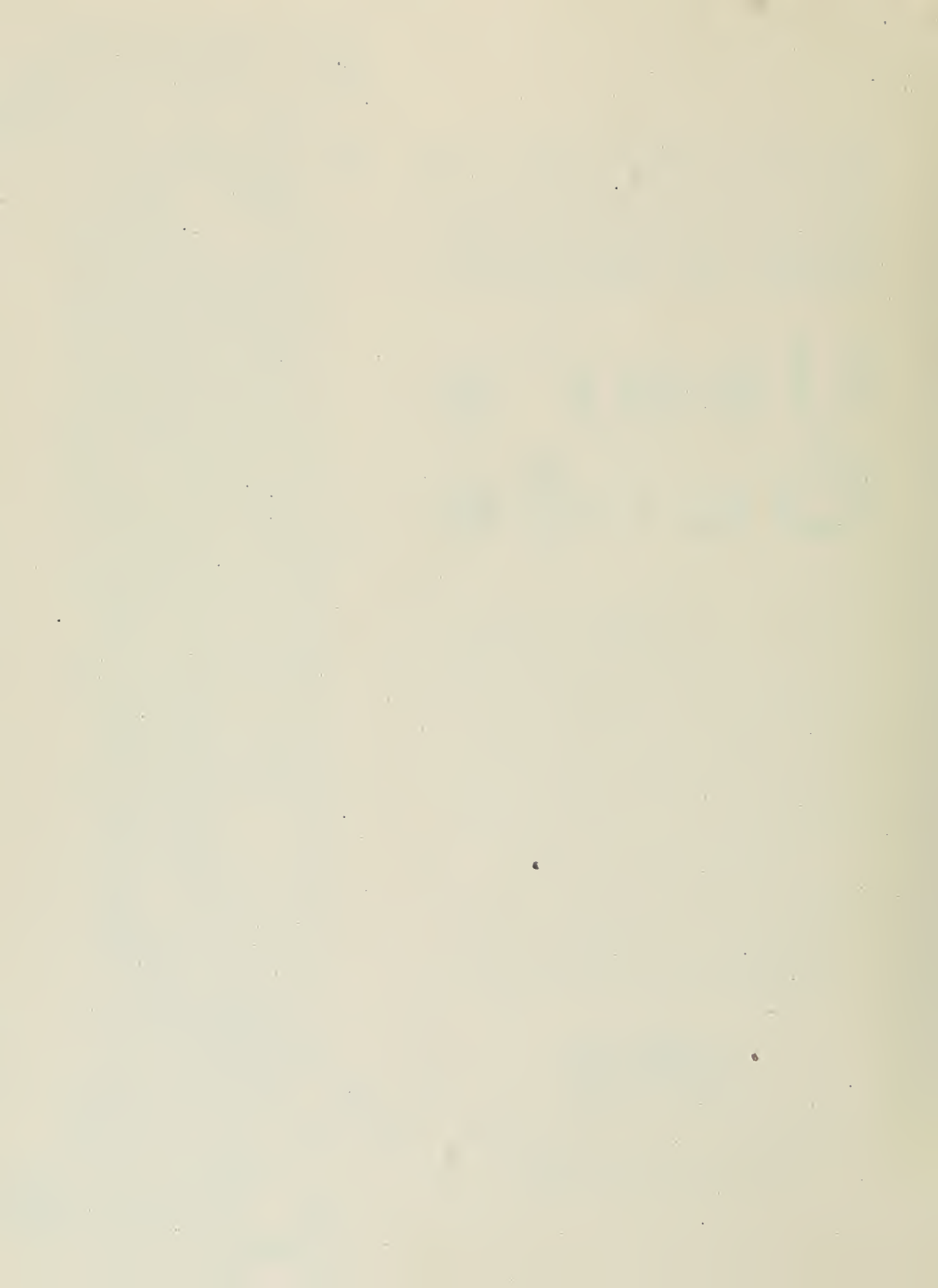
Since 1969, Pollution Probe has led the way in raising the public's awareness of environmental issues and become one of Canada's most respected non-profit environmental groups. Through its research and advocacy programmes, Pollution Probe promotes innovative and practical solutions to our most pressing environmental problems.

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Ontario's Environmental Bill of Rights (EBR) User's Guide

Table of Contents

Introduction to the EBR	1
The history of the EBR	2
The purpose of the EBR	3
The structure of the EBR	4
The EBR implementation schedule	5
Your rights under the EBR	6
The Statement of Environmental Values	8
The Environmental Commissioner	9
Your right to participate	10
Your right to notice	12
Your right to comment	14
The classification of instruments	16
Your right to appeal	18
Requesting a review	20
Requesting an investigation	22
Your right to sue	24
Your other legal rights	27
Protection from reprisals	28

These are your new environmental rights

Whether you are a community leader or a high school student, the owner of a large factory, a farmer or an interested individual, the Environmental Bill of Rights allows you to make a meaningful contribution to the protection of Ontario's environment.

The EBR User's Guide provides step-by-step instructions for taking advantage of your environmental rights:

- ❖ the right to a healthful environment;
- ❖ the right to participate in government decisions that will significantly affect the environment;
- ❖ the right to make the government accountable for the environmental decisions it makes;
- ❖ the right to improved public access to the courts;
- ❖ the right to report, without reprisal by your employer, environmental situations in the workplace.

The EBR User's Guide An Introduction

On February 15th, 1994, the Environmental Bill of Rights (EBR) took effect and the people of Ontario received an important new tool to help them protect and restore the natural environment. While the Government of Ontario retains the primary responsibility for environmental protection, the EBR provides every resident with formal rights to play a more effective role. Your opportunities to contribute are guaranteed in a number of areas:

Public Participation: The EBR establishes a formal framework for notifying the public about proposed legislation, policies, regulations and other legal instruments that will have a significant effect on the environment and then considering the public's input before the government makes a final decision.

Government Accountability: Any resident can now hold the government accountable for what it does — and what it does not do — to protect the environment. Among other things, 14 government ministries must develop and implement Statements of Environmental Values (SEVs) to guide their actions.

Environmental Commissioner: The EBR creates an independent Environmental Commissioner who is appointed by, and reports to, the Ontario Legislature.

Request for Investigation or Review: Any two persons can request that the government investigate the alleged violation of an environmental law. The EBR also provides a process for you to request that existing laws be reviewed or new ones developed.

Access to the Courts: If unsatisfied with the government's response to an environmental issue or concern, a resident has improved access to the courts to seek corrective action. Enhanced access is provided through the creation of a new cause of action to protect public resources and changes to the public nuisance rule.

Employer Reprisal: Additional protections are provided to protect employees against reprisals if they report unlawful environmental practices of their employer.

The EBR is one of the most significant environmental laws enacted in the province in the last 25 years. However, the first step in ensuring its success is to make the public aware of what the law is intended to do and how it works. It is for this reason that the Environmental Bill of Rights User's Guide was developed.

This publication describes the history, purpose and content of the legislation. It explains your environmental rights under the law and shows, step-by-step, how they can be used to protect the environment.

The EBR guarantees the basic environmental rights of Ontario residents and opens the decision-making process to greater public scrutiny than ever before. The regulations that will put many of its provisions into effect are still under development, and other requirements are being phased in during a five-year period.

Until we have gained some practical experience with the implementation and application of the EBR, it is impossible to predict how every detail of the Act will work. However, the legislation is clear in its intent and explicit in its operating provisions.

The Preamble of the Environmental Bill of Rights:

The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

The History of the EBR

Which Ontario ministries will be affected?

The provisions of the EBR apply to 14 government ministries. Their obligations and duties under the Act are being phased in during a five-year period. The precise implementation schedule is outlined on page 5.

Agriculture, Food &
Rural Affairs

Consumer &
Commercial Relations

Culture, Tourism
& Recreation

Economic
Development & Trade

Environment
& Energy

Finance

Health

Housing

Labour

Management Board
of Cabinet

Municipal Affairs

Natural Resources

Northern
Development & Mines

Transportation

The History of the EBR

Over the years, proposed legislation that attempted to guarantee an individual's "environmental rights" has meant different things to different people. To some, it promised to be a kind of "super law" that would answer every grievance and solve every problem. For others, it seemed to be nothing more than a vague statement of general principles. Ontario's Environmental Bill of Rights (EBR) should be viewed in different, more practical terms.

Some provincial statutes already incorporated certain environmental rights (such as the public hearing provisions under the *Environmental Assessment Act*). But many others were silent on the subject. The EBR represents a consistent, minimum set of rights and powers that must be accorded all members of the public if they, collectively or as individuals, are to contribute to government efforts to protect the environment. To ensure that such public rights are respected, the Act also prescribes the minimum rules government ministries must follow in actions, including the implementation of the legislation under their control, that may have a significant impact on the environment.

The EBR is unique in many ways, beginning with the way it was developed. By the early 1970s, a growing number of concerned environmental groups had recognized the need for a comprehensive code of individual rights to complement and support the province's environmental laws. Between 1979 and 1991 — while an impressive collection of air, water and waste-related laws and regulations were being written and enacted in Ontario — no fewer than nine private member's bills that dealt with environmental rights were introduced into the Legislature.

While support for the formal recognition of environmental rights was slowly building, a number of important and related reforms were undertaken. The *Environmental Assessment Act*, the *Intervenor Funding Project Act* and the *Class Proceedings Act, 1992*, among other statutes, have each broadened and supported the public's access to and involvement in the resolution of significant environmental decisions.

In 1990, the government launched public consultations on the need for and the possible contents of an Environmental Bill of Rights. Following these preliminary discussions, a multi-stakeholder committee, the Environmental Bill of Rights Task Force, was struck in September of 1991 to assist in the development and drafting of a proposed bill. The Task Force met more than 50 times from its inception until its draft report was released for public review and comment in July of 1992. Based on the feedback the draft report provoked, a supplemental report was submitted to then Minister of the Environment Ruth Grier in early 1993.

The *Environmental Bill of Rights Act, 1993* was given first reading on May 31, 1993, and its third and final reading on December 14, 1993. It was proclaimed into law by the Minister of Environment and Energy, the Honourable C.J. (Bud) Wildman, on February 15, 1994. Although it has been proclaimed, not all of the new law's requirements are effective immediately. The government's obligations under the EBR are designed to be phased in during a five-year time frame. For example, all of the Act's provisions apply to the activities of the Ministry of Environment and Energy within the first year of the law's proclamation, while other ministries will be subject to the Act at a later date.

What are the purposes of the EBR?

As described in Section 2 of the legislation, the EBR provides the means to:

- ❖ protect, conserve and, where reasonable, restore the integrity of the environment;
- ❖ provide for the sustainability of the environment;
- ❖ protect the right to a healthful environment.

The legislation has been designed to:

- ❖ prevent, reduce and eliminate the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment;
- ❖ protect and conserve biological, ecological and genetic diversity;
- ❖ protect, conserve and encourage the wise management of our natural resources, including plant life, animal life and ecological systems;
- ❖ identify, protect and conserve ecologically sensitive areas or processes.

How are these purpose statements used?

The goals of the EBR establish the framework for the legislation. It is important that they are clearly and accurately described because they represent the intentions or "spirit" of the law. They will guide its implementation, interpretation and application.

The purpose statements also assist in the implementation of specific sections of the Act. For example, every ministry subject to the EBR has drafted a Statement of Environmental Values (SEV). In crafting these Statements, each ministry explained how the purposes of the EBR will be considered in any decision it makes that might significantly affect the environment.

Courts will also look at the purpose statements of a piece of legislation when deciding how to interpret its provisions, or when reviewing the adequacy of some action taken under that law.

How does the EBR achieve its purposes?

In order to fulfill its goals, as set out above, the EBR provides:

- ❖ the means by which residents may participate in the making of environmentally significant decisions by the Government of Ontario;
- ❖ increased accountability of the Government for its environmental decision-making;
- ❖ increased access to the courts by residents for the protection of the environment;
- ❖ enhanced protection for employees who take action in respect of environmental harm.

What the EBR does

The EBR provides the public with a number of rights that permit residents to play a full and meaningful role in protecting the environment. While most of the legislation is concerned with spelling out exactly how the public can get involved in environmental decision-making, the opening passages of the EBR describe the fundamental environmental goals the Act seeks to achieve, both now and into the future.

The provisions that set out the purposes of the EBR, may be found in Sections 2.1 and 2.2 of the Act.

The Structure of the EBR

Key EBR Definitions

"Air"

Open air not enclosed in a building, structure, machine, chimney, stack or flue

"Environment"

The air, land, water, plant life, animal life and ecological systems of Ontario

"Harm"

Any contamination or degradation, including harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation

"Land"

Surface land not enclosed in a building, land covered by water (including wetland) and all subsoil

"Public Resource"

Means (a) air; (b) water, not including water in a body of water the bed of which is privately owned and on which there is no public right of navigation; (c) unimproved public land; (d) any parcel of public land that is larger than five hectares and is used for: (i) recreation; (ii) conservation; (iii) resource extraction; (iv) resource management; or (v) a purpose similar to one mentioned in subsections (i) to (iv); or (e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d)

"Water"

Surface water and groundwater

For more EBR definitions, see pages 10 and 26.

The EBR Comprises Eight Parts

❖ Part I: Definitions and Purposes

Describes the purposes of the Bill and contains definitions and interpretive provisions. (See page 3 of this guide for more information.)

❖ Part II: Public Participation in Government Decision-Making

Sets out minimum levels of public participation that must be met before the Government of Ontario, through its prescribed ministries, makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments. (See pages 10-19.)

❖ Part III: The Environmental Commissioner

Provides for the appointment of the Environmental Commissioner who reviews compliance with the requirements of the EBR and facilitates the public's recourse to the rights provided by the Bill. (See page 9.)

❖ Part IV: Application for Review

Provides for applications for the review of existing or the need for new Ontario policies, Acts, regulations or instruments by Ontario residents who believe that such a review should be undertaken to protect the environment. (See pages 20-21.)

❖ Part V: Application for Investigation

Provides for applications for investigation by Ontario residents who believe that a prescribed Act, regulation or instrument has been contravened resulting in environmental harm. (See pages 22-23.)

❖ Part VI: Right to Sue

Permits Ontario residents to bring an action against a person they believe has contravened or will imminently contravene a prescribed Act, regulation or instrument, and the contravention has or will cause significant harm to a public resource in Ontario. As well, the EBR removes certain restrictions to bringing an action in cases where one has suffered direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment. (See pages 24-27.)

❖ Part VII: Employer Reprisals

Permits employees to complain to the Ontario Labour Relations Board in cases where an employer has taken reprisals against the employee on a prohibited ground (such as "blowing the whistle" on an environmental situation at work or exercising one's environmental rights under the EBR). (See page 28.)

❖ Part VIII: General

Sets out regulation-making powers and other matters of a general nature.

The EBR Implementation Schedule

Schedule for Phasing In Ontario Ministries

Ministry	Deadline for Final SEVs *	Notification of Proposed Acts & Policies	Instrument Classification & Notice	Application for Review Provisions
Agriculture, Food & Rural Affairs	Nov. 15/94	April 1/95	n.a.**	April 1/96
Consumer & Commercial Relations	Nov. 15/94	April 1/95	April 1/96	April 1/96
Culture, Tourism & Recreation	Nov. 15/94	April 1/95	n.a.	n.a.
Economic Development & Trade	Nov. 15/94	April 1/95	n.a.	n.a.
Environment & Energy	Nov. 15/94	Aug. 15/94	Nov. 15/94	Feb. 1/95
Finance	Nov. 15/94	April 1/95	n.a.	n.a.
Health	Nov. 15/94	April 1/95	n.a.	n.a.
Housing	Nov. 15/94	April 1/95	n.a.	n.a.
Labour	Nov. 15/94	April 1/95	n.a.	n.a.
Management Board of Cabinet	Nov. 15/94	April 1/95	n.a.	n.a.
Municipal Affairs	Nov. 15/94	April 1/95	April 1/98	April 1/98
Natural Resources	Nov. 15/94	April 1/95	April 1/96	April 1/96
Northern Development & Mines	Nov. 15/94	April 1/95	April 1/96	April 1/96
Transportation	Nov. 15/94	April 1/95	n.a.	n.a.

(* SEV -- Statement of Environmental Values, ** n.a. -- not applicable)

Schedule for Phasing In Ontario Statutes

Acts	Notification of Proposed Regulation	Request for Investigation Provisions	Employer Reprisal Provisions
<i>Aggregate Resources Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Conservation Authorities Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Crown Timber Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Endangered Species Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Energy Efficiency Act</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94
<i>Environmental Assessment Act</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94
<i>Environmental Bill of Rights</i>	Nov. 15/94	n.a.	Feb. 15/94
<i>Environmental Protection Act</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94
<i>Fisheries Act (Canada)</i>	n.a.	April 1/96	Feb. 15/94
<i>Game & Fish Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Gasoline Handing Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Lakes & Rivers Improvement Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Mining Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Niagara Escarp. Planning & Dev. Act</i>	Nov. 15/94	n.a.	Feb. 15/94
<i>Ont. Waste Management Corp. Act</i>	Nov. 15/94	n.a.	Feb. 15/94
<i>Ontario Water Resources Act</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94
<i>Pesticides Act</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94
<i>Petroleum Resources Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Planning Act</i>	April 1/96	n.a.	Feb. 15/94
<i>Provincial Parks Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Public Lands Act</i>	April 1/96	April 1/96	Feb. 15/94
<i>Waste Management Act, 1992</i>	Nov. 15/94	Aug. 15/94	Feb. 15/94

Although *The Environmental Bill of Rights Act, 1993* was proclaimed into law on February 15, 1994, not all of the new law's requirements are effective immediately.

The government's obligations under the EBR are designed to be phased in during a five-year time frame. For example, all of the Act's provisions applied to the activities of the Ministry of Environment and Energy within the first year of the law's proclamation.

The charts on this page show how the prescribed ministries and legislation are being phased in. The implementation schedule is found in Ont. Regulation 73/94 (as amended by 681/94 and 719/94).

Your Rights under the EBR

What Rights does the EBR Give the Public?

The EBR provides the public with a number of formal opportunities to become involved in the governmental decision-making process, and a right to participate in and contribute to decisions that will have a significant effect on the environment. These rights can be described in terms of: the public right to a healthful environment; increased public participation in decision-making by government; improved public access to the courts; increased government accountability for its environmental decisions; and protection from reprisal for reporting environmental situations in the workplace.

Your Right to a Healthful Environment

The Issue:

Before the passage of the EBR, the people of Ontario were limited in what they could do to protect their right to a healthful environment. They often didn't know what kind of significant environmental decisions were being taken or how to get involved in the decision-making process. There were restrictions to gaining access to the courts and tribunals to attempt to resolve problems causing serious harm to environment. And workers were not fully protected from reprisal when they informed authorities of environmental situations at work.

What the EBR does:

The EBR recognizes that Ontario residents must have the tools necessary to protect their right to a healthful environment. To further this end, the EBR outlines a number of important legal rights and opportunities. It prescribes in law a clear, uniform and publicly-accessible system of decision-making that provides both an opportunity for better decisions and a promise of greater government accountability. Finally, it establishes an Environmental Registry as a tool for public notification.

Your Right to Participation in Decision-Making by Government

The Issue:

Every year, the Ontario government makes thousands of decisions — new policies, regulations, licenses, permits and approvals — that affect the environment. In the past, some of these decisions incorporated an opportunity for public input, an opportunity provided at the discretion of the decision-making agency. But in many cases, the public had no formal right to have their concerns heard.

Apart from complying with the *Freedom of Information and Protection of Privacy Act*, government agencies were not required to disclose any of the background papers and scientific studies on which they based their decisions.

When public debate has taken place, it has been limited to proposals for new policies, Acts, regulations or instruments. There was no formal method for asking the government to review any of its existing legal instruments, nor for the public to have any formal input into the need for additional protections or controls.

What the EBR does:

The EBR gives the public the right to participate in environmentally-significant decisions. For those activities subject to the EBR, the public must be given notice (through, for example, the Environmental Registry) of proposals for new policies, Acts, regulations and instruments. Then they must be given an opportunity to review basic information pertaining to the proposal, a mechanism to comment on it, and the assurance that their comments will be considered in reaching a final decision.

In certain instances, the public will also have the opportunity to appeal a decision or an instrument to an independent board.

Further, the EBR provides a mechanism to ensure the public has the opportunity to formally ask the government to review an existing policy, regulation or instrument, or to consider the need for a new policy, Act, regulation or instrument to protect the environment.

For more information on participating in environmental decisions-making, see pages 10 to 19

Your Rights under the EBR

Your Right to Action – Keeping Government Accountable

The Issue:

In the past, not all provincial ministries may have always given due consideration to the environmental significance of their decisions and actions. Many of the EBR's provisions are designed to ensure that ministries take the environment into account in a more coherent, systematic and consistent basis. This is promoted by the Statements of Environmental Values (SEVs).

For more information on keeping government accountable, see pages 8 and 9, and 20 to 23

What the EBR does:

There are several components of the EBR that further the government's environmental accountability. Within specific time lines laid out in the Act, designated ministries have each developed, distributed for consultation and then adopted a Statement of Environmental Values. These documents will guide the decisions of each ministry.

To oversee the implementation of the Statement of Environmental Values, as well as to monitor the implementation of the statute's other provisions, the EBR establishes the Office of an independent Environmental Commissioner. The Commissioner has specified duties and powers under the Act.

Your Right to Sue – Access to the Courts

The Issue:

Every year, government ministries receive many thousands of questions and complaints related to environmental concerns. Relatively few of these complaints result in court action or prosecution. In most instances, the lack of legal action is reasonable and appropriate in the circumstances. However, the complainant may be dissatisfied with the government's response.

If the government does not act, complainants are often left without a practical option for addressing their concerns. There are legal restrictions which make it difficult to obtain "standing" or status in court in order to halt the activities of those who have degraded the environment. In most cases, a person cannot sue someone who has harmed a public resource unless the person launching the suit has suffered personal injury to health or property or some direct financial loss. Even in cases where people or their property are directly affected as a result of a public nuisance causing environmental harm, barriers existed that may preclude a court action.

What the EBR does:

The EBR improves access to the courts in a number of ways. First, the EBR provides a right to request an investigation which, if warranted, may result in the ministry conducting the investigation and bringing forward a court action on your behalf. This makes government more responsive to the your concerns.

Second, the EBR creates a new right to sue. Under the Act, the public has access to the court where a public resource has been harmed or imminently could be harmed by someone who is not acting within the environmental laws and when the government has not taken action.

Third, the EBR removes the public nuisance barrier to court access. No longer will those who suffer harm be denied access to the courts simply because their injury is similar to that borne by others in the community.

For more information on gaining access to the courts, see pages 24 to 27

Your Right to Protection from Employer Reprisals

The Issue:

Under some provincial statutes, an employee who informs authorities about an employer's activities that may be harming the environment is offered protection against certain reprisals by that employer. However, those measures of protection have been limited to actions taken under only a few provincial statutes.

What the EBR does:

The EBR enhances worker protection from reprisal by expanding existing "whistle blower" protection to a larger number of workers and to all of the 20 statutes designated under the Act. The EBR also provides protection for employees who may be harassed or disciplined as a result of their participation in activities under the EBR.

For more information on whistle blower protection, see page 28

Statement of Environmental Values

What the EBR does

How do we know that government ministries will attempt to implement the purposes of the EBR? In light of the complexity and diversity of work done by different ministries, it is always difficult to judge whether ministries are following the general directions of the EBR. It is for this reason that the EBR mandates each ministry subject to the EBR to develop and follow a "Statement of Environmental Values" (SEV).

SEVs are designed to translate the broad purposes of the EBR to the work of specific ministries. These SEVs have been developed according to time lines in the Act, including allowance for public participation.

SEVs are outlined in the EBR under Part II, Sections 7 to 11.

SEVs and the Public's Role

SEVs and the public's role

The SEVs that have been posted on the Environmental Registry will guide the environmentally sensitive activities of the originating government ministries. Interested members of the public should review those SEVs in order to understand how each ministry plans to incorporate the purposes of the EBR into its decision-making activities.

Monitor ministry compliance with the SEVs

The public has an important role to play in ensuring that each ministry is adhering to its own SEV commitments. One of the Environmental Commissioner's tasks is to report to the Ontario Legislature on ministry compliance with its SEV. Input from the public would be valuable in charting such compliance.

The Statement of Environmental Values (SEV)

Step 1, What is the Statement of Environmental Values?

Under the EBR, each designated ministry has been required to prepare a Statement of Environmental Values (SEV). The SEV includes information on:

- ❖ how the ministry will apply the purposes of the EBR to any decision that might significantly affect the environment (the purposes of the EBR are described on page 3);
- ❖ how the purposes of the EBR should be integrated with other considerations within the ministry, including social, economic and scientific considerations.

The SEV has two principal functions. First, it is designed to guide ministry staff when making decisions that may have an effect on the natural environment. This will ensure that the objectives of the EBR are carried out. Second, the SEV serves as a benchmark against which the public and the Environmental Commissioner may evaluate ministry decisions.

The SEV is not meant to guarantee that the purposes of the EBR are embodied in every government decision. Rather, the goal is to ensure that the environment is given due consideration -- along with economic, social and scientific concerns -- when decisions are made. The SEV serves as the embodiment of a ministry's environmental commitment and its guiding principles in that regard.

Step 2, Public may periodically provide input

The SEVs were posted on the Environmental Registry on November 15, 1994. The SEVs are "living documents" and are likely to be updated over time. Hence, the public should be aware of any opportunity available to provide additional input.

Step 3, Using the SEV

Now that the SEVs are in place, a minister must take every reasonable step to ensure that it is considered whenever decisions that might significantly affect the environment are made in the ministry.

The Office of the Environmental Commissioner

Who is the Environmental Commissioner?

The Environmental Commissioner is an officer of the Ontario Legislative Assembly. This means the Commissioner is a public servant and does not report to any single ministry, but rather to the Legislature itself.

The Commissioner is appointed by the government, on the advice of the Legislature, for a term of five years, and must swear to "faithfully and impartially exercise the functions of the office."

The Commissioner serves as an auditor by reviewing:

- ❖ the implementation of the EBR and compliance by ministries with its requirements;
- ❖ the use of the Environmental Registry;
- ❖ the exercise of discretion by ministers under the Act;
- ❖ recourse to appeal decisions on Class I and II instruments;
- ❖ the receipt, handling and disposition of applications for review or investigation;
- ❖ ministry plans and priorities for conducting reviews of policies, regulations and instruments;
- ❖ the use of the right of action, its defences and the public nuisance provisions of the Act;
- ❖ the operation of the whistle blower provisions of Act.

The Commissioner serves as a clearinghouse for:

- ❖ applications for review and investigation, directing these to the appropriate ministries.

The Commissioner serves as an educator by:

- ❖ assisting ministries to develop their Statement of Environmental Values and use them in decision-making (upon request);
- ❖ assisting ministries with education programs (upon request);
- ❖ providing educational programs about the Act to the public;
- ❖ providing advice and assistance to members of the public who wish to participate in decision-making processes facilitated under the Act.

The Commissioner keeps the government accountable by:

- ❖ submitting to the Legislature every year a report describing the work undertaken by the Commissioner (the first of these is due in early 1996);
- ❖ reporting to the Legislature at any time on any manner that cannot wait until the annual report is submitted.

Contact the Environmental Commissioner in order to:

- ❖ ask questions on how to use the provisions of the EBR;
- ❖ get copies of the forms needed to apply for a review or investigation, or use your other EBR rights;
- ❖ forward your applications for a review or investigation;
- ❖ provide suggestions on how to improve the operation of the EBR;
- ❖ provide your views on how any particular part of the EBR is working, whether ministries are complying with their requirements under the EBR, or any other matter related to the EBR.

What the EBR does

The implementation of the EBR may raise some questions: Are ministries complying with their SEVs? Is the public being given an opportunity to participate in a meaningful manner? How is the Environmental Registry working? Are investigations being undertaken appropriately?

In response, the EBR has established the Office of the Environmental Commissioner, an independent body to review and report on the implementation and operation of the Act.

The Environmental Commissioner is given the mandate: to review the implementation and compliance of prescribed ministries with the requirements of the Act; to review the operation of the rights granted to the public; act as clearinghouse to handle the various applications for review and investigation to the appropriate ministry; and to report directly to the Ontario Legislature at least once a year.

The Office of the Commissioner is established under Part III and its functions and duties outlined in Sections 49 to 60 of the EBR.

To contact the Environmental Commissioner:

Ms. Eva Ligeti
Environmental Commissioner,
1075 Bay St., Suite 605,
Toronto, Ontario M5S 2B1
Telephone: 416-325-3377
Fax: 416-325-3370

Your Right to Participate

What the EBR does

The architects of the EBR recognized the need to include the views of the public, in a fair and effective manner, into all significant environmental decisions. Some ministries did so already. However, prior to the passage of the EBR, many decisions — from new regulations and Acts to orders and operating permits — were still made without the benefit of public input. In instances where the public was involved, that participation was often at the discretion of the decision-maker.

Part II of the EBR develops a comprehensive public participation regime, and establishes the minimum levels of public participation that must be incorporated into government decisions on certain kinds of environmentally-significant proposals. Such proposals include designated classes of new or amended legislation, regulation, policies and other legal instruments.

Key EBR Definitions

An Instrument:

Any document of legal effect issued under an Act, including a permit, licence, approval, authorization, direction or order, but not including any regulation

A Policy:

A program, plan, objective, guideline or criteria to be used in making decisions about the issuance, amendment or revocation of instruments, but not including any Act, regulation or instrument

A Regulation

As defined under the *Regulations Act*

Your Right to Participate

The EBR does not duplicate existing public participation processes but, rather, establishes a new, minimum level of public notice and consultation for environmentally significant decisions. The Act is designed to ensure that you have certain rights to participate in all significant environmental decisions made in Ontario. These rights are expressed through several mechanisms:

❖ Your right to notice

The government must give notice of all proposed policies, Acts, regulations and instruments that are deemed to be environmentally significant. The primary mechanism for notice is a publicly-accessible Environmental Registry (see page 13) which contains information on pending proposals, the decision-making time lines, and how the public can participate.

❖ Your right to comment

During the notice period, the public has a right to submit comments on any proposal. The opportunities provided for public participation are dependent on the environmental significance of the proposal. The minister in reaching a decision has an obligation to consider all the comments received and communicate how those comments affected that decision. This information is also placed on the Registry.

❖ Your right to appeal

For Class I and II instruments (approvals), members of the public may seek permission to appeal the government decision. For more information on your "leave" to appeal, contact the responsible appeal agency.

Which Proposals are Subject to the EBR?

In fulfilling its legislative mandate, the government and its ministries make thousands of decisions every day. These decisions can be categorized into four major groups — acts, regulations, policies and instruments. Not all of these are subject to the EBR. In determining which are, it is necessary to ask the following questions:

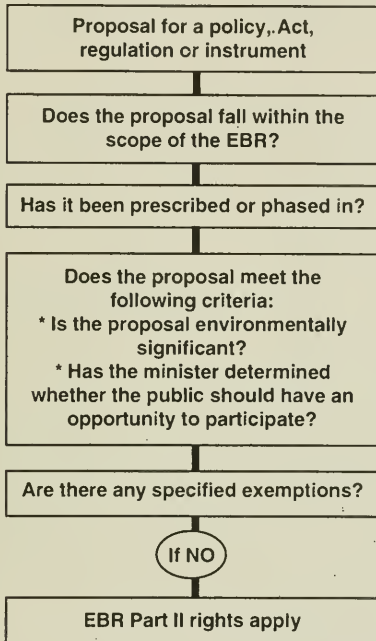
- ❖ Does the proposed decision fall within the scope of the EBR (i.e., has it been made under one of the Acts prescribed under the EBR)?
- ❖ Has the presiding ministry been phased-in under the EBR?
- ❖ Will the proposal significantly affect the environment?
- ❖ Is there an exemption in the EBR that excludes public participation?

Step 1, Is the proposal prescribed under the EBR?

In order for a proposed decision to be subject to the requirements of the EBR, both the ministry making the decision and, in the case of regulations and instruments, the decision itself must be under a "prescribed" statute. Prescribed ministries and statutes are formally listed in Ont. Regulation 73/94, enacted under the EBR. A list of prescribed ministries and statutes may be found on page 5 of this guide.

Ont. Regulation 681/94 outlines the instruments that are prescribed under the EBR for the Ministry of the Environment and Energy. The classification of an instrument (such as an approval, order or permit) determines, first, whether it is subject to the EBR and, second, the opportunity for public comment it is accorded.

Decisions Subject to EBR



The other ministries subject to the "notice of instruments" provisions of the Environmental Registry are each required to develop their own regulations to classify and prescribe the instruments under their control. See pages 16-17 for further discussion on the classification of instruments

Step 2, Has the ministry been phased-in under the EBR?

The requirements of the EBR are being implemented over a five-year phase-in period. The implementation schedule appears on page 5.

Step 3, Is the proposal environmentally significant?

Although a proposed policy, Act, regulation or instrument and the issuing ministry may both be prescribed under the EBR, a proposal must still satisfy several criteria before the public participation requirements take effect. Foremost, it must be classed as "environmentally significant." For proposals pertaining to policies and regulations, the

minister must make that determination, on a case-by-case basis, using the following criteria:

- ❖ the extent and nature of the measures that might be required to limit or avoid harm to the environment;
- ❖ the geographic extent, whether local, regional or provincial, of any harm to the environment;
- ❖ the nature of the private and public interests involved in the decisions;
- ❖ any other matters the minister considers relevant.

In addition, if a proposed policy or Act is deemed to be environmentally significant, it is only subject to the EBR if a minister believes that the public "should have an opportunity to comment on the proposal before implementation." The minister has no discretionary powers to exclude prescribed regulations.

For proposals pertaining to instruments, a more formal process, which involves classifying an instrument into one of three classes, is used to identify an instrument subject to the EBR (see pages 16-17).

Step 4, Do any exemptions limit public participation?

The provisions, that may be used to exclude a proposal from the public notice and participation provisions of the EBR, include:

❖ Exemptions for an Emergency:

A minister may exempt any proposal from the public participation requirements if the associated delay would result in: danger to the health or safety of any person; harm or serious risk to the environment; or damage or serious risk to any property. If such discretion is exercised, the minister must place a notice on the Environmental Registry of the decision to proceed with the activity on an emergency basis allowing no comment period.

❖ Exemptions for a Substantially Equivalent Process:

A policy, regulation or instrument may be exempted if it has already been, or is required to be, subject to a public review process "substantially equivalent" to the process required under the EBR. If an EBR exemption is planned under this provision, the minister must give notice of the decision to proceed without a comment period on the Environmental Registry as soon as possible after the decision is made.

❖ Other Exemptions for Policies and Regulations:

Proposed policies and regulations that are "predominantly financial or administrative in nature" are deemed not to have a significant environmental effect. Budget statements delivered to the Legislature (as well as any policy, Act or regulation that would give effect to same) are also excluded. No Registry notice is required.

❖ Other Exemptions for Instruments:

A proposal for any instrument which is considered a step towards implementing a decision under the *Environmental Assessment Act* (or the decision of a tribunal that offered the opportunity for public participation) is exempt from the Registry notice requirements.

Your Right to Notice

What the EBR does

In order to participate in environmental decision-making, the public must be able to find out what proposals are pending. In the past, most proposals were made without advance notice. Even if one did hear about a proposal, it often proved difficult to find more information on how to get involved.

The EBR establishes a mechanism for providing the public with the details of proposed Acts, regulations, policies and instruments — along with other important information — before a final decision is made. All environmentally significant proposals must be placed on the Environmental Registry, a province-wide computer bulletin board system (BBS) offering free access to the public. The Registry will provide immediate notice of proposals and decision-making activities that may significantly affect the environment.

Notice may also be provided through newspaper ads, flyers or other means.

In addition to other public participation requirements found throughout Part II, the specific provisions dealing with notice are found in Sections 27 and 28 of the EBR. Sections 3 and 5 cover the purpose and authority to create the Environmental Registry.

Your Right to Notice

Step 1, General rules

Whenever a proposal is subject to the public participation requirements of the EBR, the public must be notified. The EBR outlines how such notice must be given. The rule of thumb is that the more significant the decision, the greater the rights of notice and comment that are afforded the public (see the box on page 13).

Step 2, Minimum notice on the Environmental Registry

The most basic type of notice is provided through the Environmental Registry, a computer bulletin board system (BBS) which contains information -- in both French and English -- on all proposed decisions subject to the EBR, and includes:

- ❖ general information on the EBR and its regulations;
- ❖ EBR phase-in schedules for government ministries;
- ❖ definitions and help screens;
- ❖ the Statements of Environmental Values for prescribed ministries;
- ❖ notice of proposals and decisions on environmentally significant Acts, policies, regulations and instruments;
- ❖ appeals and decisions on instruments;
- ❖ relevant court actions, lawsuits and decisions.

The Environmental Registry is a tool for providing the minimum level of public notice and participation that a prescribed ministry must meet before it makes a decision on certain kinds of environmentally significant proposals. The Registry ensures that consistent, standardized information is made available to the public in a timely manner. For each proposal, the following minimum information must be placed on the Environmental Registry by the originating ministry:

- ❖ a brief summary of the proposal (it is not required to enter the full text of the proposal onto the Registry);
- ❖ ways the public can participate in the decision;
- ❖ the timing for public participation;
- ❖ where and when the public can view written information on the proposal;
- ❖ an address where comments on the proposal can be submitted.

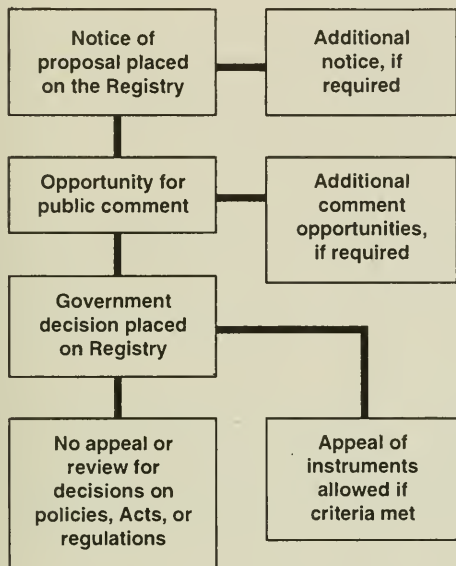
Step 3, Additional notice for Class II and III instruments

The Environmental Registry provides for the "minimum" notice required under the EBR. A minister may also order additional notice for any decision. The Act makes provision for additional notice for Class II and III instruments and sets criteria to guide ministerial discretion.

Examples of additional notice may include: news releases, direct contact with community and environmental organizations, door-to-door flyers, mailings, signs, and newspaper, radio and television advertisements.

In addition, Class III instruments may be subject to public notice provisions contained in the legislation or rules of practice governing the tribunal that is adjudicating the decision.

Public Participation



How to Use the Environmental Registry

Where can I access the Registry?

The Environmental Registry can be accessed through a computer equipped with a modem (a device that connects to your telephone line and can communicate with other computers). A printer will also be helpful. If you do not have a computer and modem, you can use the computer equipment at one of the following locations:

- ❖ selected public libraries (a complete list is available from the EBR office), and
- ❖ selected college and university libraries.

More detailed information on the locations of computers the public may use to obtain access to the Environmental Registry is available from the Office of the Environmental Commissioner (see page 9).

How do I get into the Registry?

Once you have access to the necessary computer and modem equipment, you can access the EBR Environmental Registry using any commonly-available communications software package (for example, CC Plus, Procomm, PC Anywhere, etc.). Dial the access number (which provides access to the Government of Ontario computer network, GONet) through your modem:

- ❖ 416-327-3000 (within local Toronto area), or
- ❖ 1-800-667-9979 (outside the local Toronto area)

From the introductory menu screen, select the entry "*Environmental Bill of Rights*" to gain access to the Environmental Registry. Access to the Registry is free, except from locations outside the Province of Ontario. The Registry may also be accessed through a number of computer systems including the Internet, various freenets and WEB. (Note: some of these networks charge membership and/or user fees.)

Once in the Environmental Registry, you will be asked to complete a user identification section and devise a password. Subsequent access will be quicker once these initial entries are made.

After the initial sign-in, the Registry provides user-friendly instructions and menus to guide you to the kind of information you are seeking.

Type of Decision	Public Notice Requirement
Acts, Policies & Regulations	Notice on Registry with discretion for enhanced notice
Class I Instruments	Notice on Registry
Class II Instruments	Notice on Registry & enhanced notice
Class III Instruments	Notice on Registry & enhanced notice

Your Right to Comment

What the EBR does

Once notice of a proposal has been made through the Environmental Registry and, perhaps, other means as well, the public then has an opportunity to comment on the matter.

In the past, there was no formal mechanism for accommodating such input on most decisions despite either their environmental impact or the level of public concern aroused. A minister was under no obligation to subject the proposal to public review. If such comment was considered desirable, there was little direction on the nature, length or kind of public participation that would be appropriate. Finally, a minister was not required to respond to any of the public input received.

The EBR formalizes the public participation process. The rules covering public comment on policies, statutes, regulations and instruments differ slightly. The general rule is: the more important the environmental decision, the greater the opportunity for public input. The minister is also obliged to consider the input received.

The relevant provisions covering public comment are found in Part II, specifically Sections 15, 16 and 22 of the EBR.

Your Right to Comment

Step 1, General rules

The EBR provides the public with a right to comment on all proposals placed on the Environmental Registry. The minimum comment period for all such proposals is 30 days, beginning from the time a proposal first appears on the Environmental Registry. The comments must take the form of a written submission forwarded to the ministry responsible for the proposal. These should be considered minimum rights; there is discretion to allow more extensive participation opportunities for any proposal.

Step 2, Increased rights of comment

Proposed Class II instruments may be afforded greater public participation rights, including: oral representations by members of the public to the minister or a body designated by the minister, public meetings, or the mediation of differences. In the case of Class III instruments, a formal hearing process is defined by the governing statute. (The opportunity for public participation afforded the various types of government proposals are displayed in the box at the bottom of page 15).

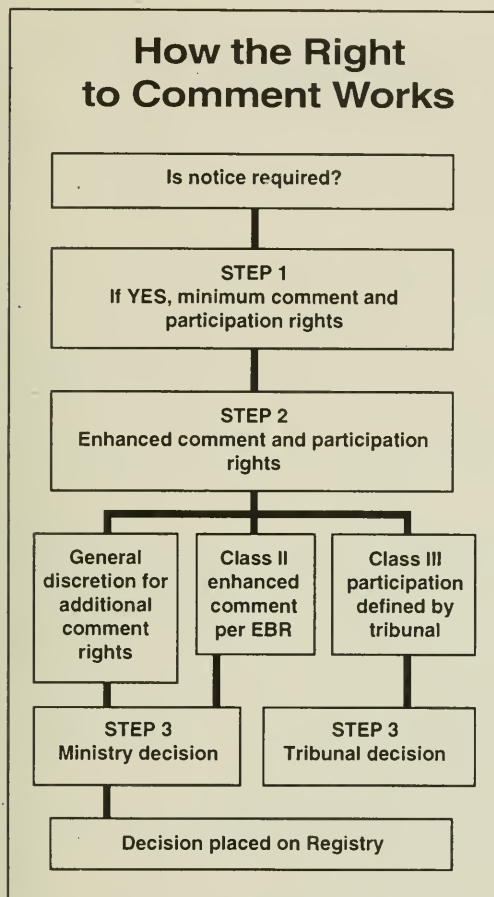
The comment period will vary according to the type of proposal under consideration. A minister may extend the 30-day comment period if warranted. There is a defined process for extending the comment time allowed for Class II instruments that is dependent on: the complexity of the matters involved, the level of public interest, the period of time the public may require to make informed comment, any private or public interest in resolving the matter in a timely manner, and any other factor the minister may consider important.

Step 3, Responsibility of the Government to respond

The right to comment on a proposal suggests that the government should be receptive to public input. In recognition of this fact, the EBR creates three duties for governments:

- ❖ **Duty #1** — Members of the public not only have the right to comment, but also the right to have their comments considered. A minister must take every reasonable step to ensure that all the comments relevant to the proposal, received through the public participation process, are duly considered.
- ❖ **Duty #2** — A minister must give notice of a decision as soon as reasonably possible after it has been made. The notice of decision is to be placed on the Environmental Registry, as well as any other information deemed appropriate by the minister.
- ❖ **Duty #3** — The notice of decision must include a brief explanation of the effect, if any, public participation had on the decision.

How the Right to Comment Works



How to Make Your Views Heard

Get the background information you require

The notice of the proposal usually provides only a basic summary. You will have to determine what other information you need to prepare and adequately comment on the proposal. The notice in the Environmental Registry should contain addresses where the proposal can be viewed.

Link-up with others sharing similar concerns

In many cases, you will not be the only one with an interest in a particular proposal. It may be worthwhile to share resources and co-ordinate your input on the proposal.

Familiarize yourself with the decision-making process

The next step is to understand the process ahead. In the case of Class II instruments, for example, there may be a broad range of public participation opportunities, including written submissions, public meetings, mediation, etc.. Outline the avenues for comment that are available, identify the approach best suited to your purpose, and organize an appropriate response. If a hearing is to be held, you may wish to investigate the availability of intervenor funding through the appropriate hearing board.

Present the best case possible

Once you understand the process, the next step is to prepare the most persuasive and comprehensive submission possible. Some of the questions you may wish to ask before completing your submission, include:

- ❖ Do I need expert advice on the proposal?
- ❖ Are all my concerns outlined clearly?
- ❖ Have I included all the necessary supporting material, including any studies, scientific information, etc.?
- ❖ Is there any other information that should be included?
- ❖ Are there other persons or groups that may support my submission?

Forward your submission

The final step is to submit your comments within the stipulated time period to the contact person listed in the notice of proposal. When the final decision is announced, review it to ensure your concerns were considered.

Type of Decision	Comment Period
Acts, Regulations & Policies	Minimum 30-day comment period
Class I Instruments	Minimum 30-day comment period
Class II Instruments	Minimum 30-day comment period & greater rights based on EBR criteria
Class III Instruments	All rights afforded by statute under which hearing has been authorized

The Classification of Instruments

What the EBR does

Which Acts, regulations, policies and instruments are environmentally significant? The answer to this question is especially important in determining which of the many thousands of instruments issued each year — covering everything from cottage septic tanks to hazardous waste facilities — are subject to the EBR.

The classification of an instrument triggers the EBR's requirements for public participation. The greatest opportunities are accorded Class III instruments. The minimum participation rights exist for those in Class I. Class II instruments fall in the middle.

As each prescribed ministry becomes subject to the EBR, it has to classify the instruments it manages and draft a classification regulation, in accordance with the schedule in the EBR.

At times, differences of opinion will arise over the classification of a particular instrument. The EBR provides a mechanism for "bumping up" an instrument to a higher class, if certain criteria are met. There are also "bump-down" provisions.

The classification provisions of the EBR are found in Part II, Sections 19-21. The "bump-up" and "bump-down" provisions are found in Section 26.

The Classification of Instruments

Step 1, Review existing instruments

Within a reasonable time after a ministry comes under the provisions of the EBR, it must propose a regulation to classify the instruments it administers as either Class I, II or III. To start this process, a ministry reviews all of the prescribed Acts it administers and lists all the provisions that relate to decision-making.

Step 2, Determine environmental significance

In determining whether an instrument may have a significant effect on the environment, the following factors must be considered:

- ❖ the extent and nature of measures that might be required to mitigate or prevent any harm to the environment;
- ❖ the geographic extent, whether local, regional, or provincial, of any harm to the environment;
- ❖ the nature of the private and public interests, including government interests, involved in the decision.

Step 3, Classify instruments

The above factors are used to assign various instruments to Class I, II or III (see box on page 13). Those that are not deemed to be environmentally significant are not classified nor are they subject to the requirements of the EBR.

If the governing legislation mandates a hearing, the instrument automatically falls into Class III. Instruments are classified as Class II in light of the potential level and extent of harm they may pose to the environment. Class II also includes those instruments where the decision to hold a hearing is discretionary. Class I instruments are those instruments not classified as Class II or III, but still considered to be of environmental significance.

Step 4, Draft classification regulation

The minister proposes a classification regulation which may be subject to public comment under Part II of the EBR.

Step 5, Conduct periodic reviews

The minister must review the classification regulation from time to time.

Step 6, Using "bump-up" and "bump-down" provisions

A minister may "bump up" a Class I instrument to a Class II instrument (and consequently increase the level of public participation). Although the EBR does not specify the factors to be considered, these could include: the extent and nature of mitigation measures, the geographic extent of potential environmental harm, and the nature of the public and private interests in the instrument.

Similarly, a minister may bump-up an instrument from Class II to Class III, but only in cases where the governing statute permits a hearing. Class III instruments may be bumped down to Class II if a decision is made not to hold a hearing.

The Classification of Instruments

Examples of Classification Under Ont. Regulation 681/94 Released by the Ministry of the Environment and Energy, November, 1994

Class I	
Section 9, <i>EPA</i>	Approvals for release of contaminants into air (with some exceptions)
Section 34, <i>OWRA</i>	Permits for taking of water, over certain amounts, for purposes other than irrigation and agriculture
Section 21 of PA Regulation 914	Proposals for interim status pesticides
Class II	
Section 7, <i>EPA</i>	Proposals for a control order imposed on a facility out of compliance
Section 43, <i>EPA</i>	Proposals for a control order to remove waste from a site that is not approved as a waste disposal site
Section 28, <i>PA</i>	Proposals for certain orders by a Director pertaining to pesticides
Class III	
Sections 27 & 30, <i>EPA</i>	Proposals for certain waste disposal systems or sites pertaining to hazardous waste or equivalent domestic waste of more than 1,500 people
Section 53, <i>OWRA</i>	Proposals for certain sewage systems
Key: <i>EPA</i> <i>Environmental Protection Act</i> <i>OWRA</i> <i>Ontario Water Resources Act</i> <i>PA</i> <i>Pesticides Act</i>	

Classification of Instruments

Class of Instrument	How it is Classified	Rights Afforded
Non-classified	Instruments deemed not to have a significant environmental effect	At the discretion of ministry considering the instrument
Class I	An instrument not classified as Class II or Class III	Minimum 30-day notice & enhanced comment rights; no hearing
Class II	Classified according to the level of risk, or if the governing Act provides for a discretionary hearing	Minimum 30-day notice & comment rights; plus a discretionary hearing
Class III	The governing Act requires a hearing to be held	Minimum 30 days notice on the Registry, & requires a hearing

Your Role in Classifying Government Decisions

The ministry's classification regulations

The first opportunity to participate in the classification process occurs during the drafting and review of the individual ministry classification regulations (the implementation schedule is to the bottom left on this page).

This is your chance to ensure that those decisions you believe to be environmentally significant are, first, classified and, second, placed in the appropriate class.

Bump-up and bump-down provisions

Once the classification regulation is in place, members of the public can still request that an instrument be "bumped-up" from a Class I to a Class II or from a Class II to Class III. A bump-down from a Class III to Class II is also possible. Although there is no mechanism in place under EBR to formally request a bump-up or a bump-down, the following information may be helpful:

- ❖ Write the minister who has jurisdiction over the instrument.
- ❖ In your submission, explain why the bump-up is important, covering such factors as: the environmental significance of the proposal; the importance of enhanced public participation; and any other information that may be helpful.

Ministries Subject to Classification Requirements

Ministry	Date
Environment & Energy	November 15, 1994
Consumer & Commercial Relations	April 1, 1996
Natural Resources	April 1, 1996
Northern Development & Mines	April 1, 1996
Municipal Affairs	April 1, 1998

Your Right to Appeal

What the EBR does

The EBR gives the public the right to participate in significant environmental proposals by ensuring advance notice and the opportunity to comment. But what happens if, in your opinion, a decision on an instrument is fundamentally flawed?

In the past, there were only a few avenues of appeal. For example, the Ministry of the Environment and Energy gave an applicant the chance to appeal an unfavourable approval decision (and any attached conditions) to the Environmental Appeal Board. However, residents did not have the right to appeal a ruling.

The EBR provides a mechanism for the public to appeal the issuance or approval of a Class I or II instrument. If certain conditions are met, any resident could ask a tribunal for permission or "leave" to appeal. If leave is granted, the tribunal would hear the appeal and decide whether the approval should be overturned or, if it is warranted, whether any additional conditions should be attached.

The right to seek appeal of an instrument, including the tests on which a leave to appeal shall be judged, is found in Part II of the EBR, Sections 38 to 48.

Your Right to Appeal Proposals for Class I and Class II Instruments

Step 1, The general rules

Any person resident in Ontario may seek permission or "leave" to appeal a decision to approve or not approve a Class I or II instrument (such instruments are defined on page 17). If leave is granted, then a full appeal can be launched before the appropriate tribunal (which will vary depending on the ministry or relevant legislation involved). More information on this may be found on the Environmental Registry.

Either the person who applied for the instrument (for example, a company seeking an operating permit) or a member of the public (who opposes the project) may not like the decision and decide to appeal. In the company's case, it must give notice of an appeal to the Environmental Commissioner who, in turn, must promptly place it on the Environmental Registry. Such a notice must include: a brief description of the decision, the grounds of the application to appeal, and any other prescribed information. The tribunal that will hear the appeal has discretion in deciding who should be a party in the hearing.

Step 2, An application for appeal must meet certain conditions

To start the process, a person applies for leave to appeal. It must be established that:

- ❖ **Condition #1** — The person seeking leave to appeal must have an "interest" in the decision. Under the EBR, previous participation in the comment period is sufficient evidence of interest in the matter.
- ❖ **Condition #2** — The instrument is "appealable" under the Act it was originally issued. That means a person (usually the person who applied for the instrument) already has the right, under that Act, to appeal the decision.
- ❖ **Condition #3** — The decision being appealed was subject to public participation under the EBR.

When seeking leave to appeal, the person must do so: within 15 days of a ministerial decision on the instrument; or within 15 days of a notice of appeal appearing on the Environmental Registry. Again, notice must be submitted to the Environmental Commissioner who will have it placed on the Registry.

Step 3, An application must pass the "leave tests"

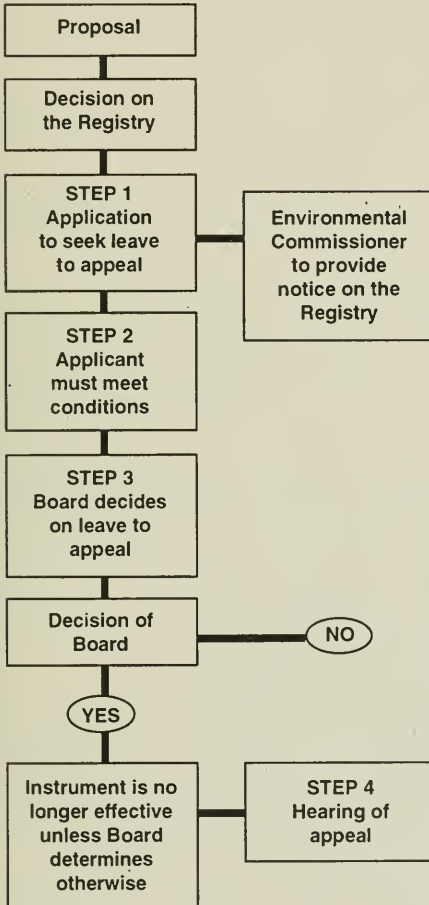
If all conditions are satisfied and deadlines met, the person seeking leave to appeal must, according to the tribunal hearing the matter, pass a two-part test before the appeal can proceed:

- ❖ **Test #1** — Is there good reason to believe that no reasonable person, having regard to the law and any relevant government policies, could have made the decision?
- ❖ **Test #2** — Could the decision being appealed result in significant harm to the environment?

Step 4, The applicant must follow the rules of the tribunal

Once leave to appeal has been granted, the rules governing the tribunal with respect to the appeal must be followed. There are significant differences in the

Public Appeals on Class I & II Instruments



rules employed by various tribunals. Under the EBR, however, the appeal tribunal is given explicit power to permit any person to participate in the appeal as it sees appropriate.

How to File a "Leave to Appeal" under the EBR

Remember to monitor the Environmental Registry

It is important that after a decision concerning a Class I or II instrument has been made, that you closely monitor the Environmental Registry to see if the person that applied for the approval is going to appeal the ruling. The Registry's Notice of Decision also contains explicit instructions on the "leave to appeal."

If you are going to seek leave, deadlines are important!

The EBR contains specific deadlines limiting when one can seek leave to appeal. If these deadlines are not met, your chance to appeal may be reduced.

Draft and submit the necessary application information

Drafting a request to the relevant tribunal is the first step in seeking leave to appeal. This request must contain all the information necessary to prove you have an "interest" in the matter and meet the other conditions required before a leave application can proceed. In addition, you must provide detailed reasons why you think you pass the basic tests for leave. In other words, why do you think the decision was unreasonable and will result in significant harm to the environment?

If you are seeking leave to appeal an instrument approved by the Ministry of the Environment and Energy, the relevant tribunal is the Environmental Appeal Board. The Board reviews and decides on the application for leave to appeal, and hears the appeal itself. For more information, contact:

Environmental Appeal Board

112 St. Clair Ave. West, Suite 502,
Toronto, Ontario M4V 1N3
Telephone: 416-314-3299
Fax: 416-314-3300

Understand the rules of the tribunal

It is very important that you understand the rules of the tribunal that is hearing the application for leave. Apart from those fundamental tests spelled out under the EBR, the rules of the tribunal are the ones that will prevail.

Requesting a Review

What the EBR does

Previously discussed provisions of the EBR outlined the rights of the public when the government is dealing with a proposed decision. But what happens if the concern is with an existing policy, regulation or instrument? Or if there is no policy, Act or regulation in place to address a perceived environmental issue.

Remember, most of the instruments that have been issued and are in force today — for air approvals, water discharges and so on — have no date of expiration.

What can you do if you believe recent studies indicate air pollution standards are too low? Or if drinking water guidelines should be broadened or strengthened? On the other hand, what if your company is restricted by a regulation you think is out-dated or inappropriate?

To respond to these kinds of issues, the EBR provides a mechanism and a detailed procedure to have such policies, regulations and instruments reviewed, or to consider drafting a new regulation, policy or Act if it is needed.

This mechanism and procedure is found in Part IV of the EBR, Sections 61 to 73.

Your Right to Ask For a Review

Step 1, Complete an application for review

Any two residents of Ontario may complete an application for a review if they believe that an Act, regulation, policy or instrument should be changed, repealed or revoked in order to protect the environment. The review must be for an existing Act, regulation, policy or instrument that is: (a) listed and subject to the EBR; and (b) cannot be a review of the need for a new exemption under the *Environmental Assessment Act*. They may also ask the minister to review the need for a new policy, Act or regulation to protect the natural environment.

Step 2, Submit the application to the Environmental Commissioner

See the flow chart on page 23 for the steps in making an application for review.

Step 3, Application referred to responsible minister

Within 10 days, the Environmental Commissioner will either: (1) forward the application to the minister who has jurisdiction over the matter; or (2) inform the applicant that the responsible ministry is not subject to the EBR.

Step 4, Minister acknowledges the application

Within 60 days, the minister in receipt of the application must inform the applicants that a request has been received at the ministry via the Environmental Commissioner. The minister may also give notice to those who "might have a direct interest in matters raised in the application," for example, the holders of an instrument, such as a Certificate of Approval, for which a review has been requested.

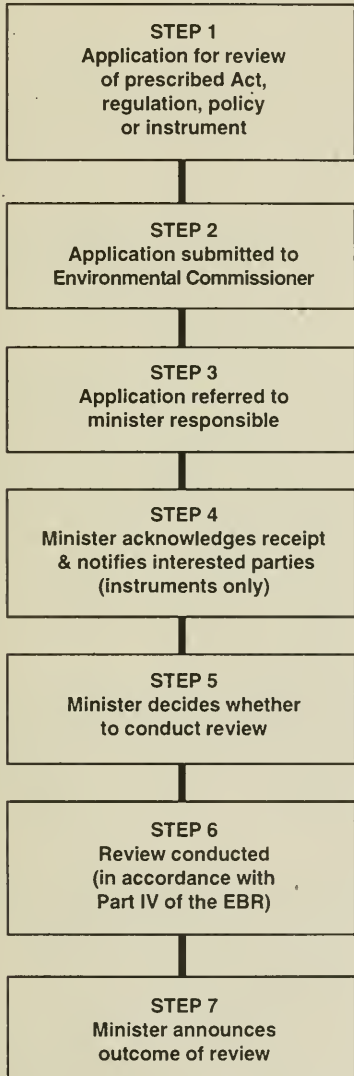
Step 5, Minister decides whether or not to conduct a review

Within 60 days of receiving the application, the minister must decide whether to undertake the review and give notice of that decision to the applicants, the Environmental Commissioner and any other person the minister has notified of the request. In determining whether it is in the "public interest" to undertake a review, the following criteria must be considered:

- ❖ Is it consistent with the ministry's Statement of Environmental Values?
- ❖ Is there potential for harm to the environment?
- ❖ Is a review not otherwise periodically undertaken?
- ❖ Is there any social, economic, scientific or other relevant information?
- ❖ Are there other submissions from directly interested parties?
- ❖ Are there substantial resource constraints to conducting a review?
- ❖ What was the extent of public participation in the development of the Act, regulation or instrument for which the review is being sought?
- ❖ How recently was the Act, regulation, policy or instrument enacted or issued?
- ❖ Are there any other matters the minister considers relevant?

A review is **not** in the public interest if the Act, regulation or instrument was developed and implemented within five years prior to the application **and** in a manner consistent with the public participation provisions of the EBR, **unless**: (a) there is social, economic, scientific or other evidence that the failure to review the decision could result in significant harm to the environment; and (b) that information was not taken into account when the decision sought to be reviewed was made.

Application for Review



Step 6, Conduct the review

If there is a review, the revisions to any Act, regulation, policy or instrument would then be treated as if they were a proposal for a new policy, regulation or instrument, and all the notice and comment provisions in Part II of the EBR would apply (see pages 10-15).

Step 7, Announce the outcome

Within 30 days of completing the review, the Minister must give notice of the outcome and the action that will be taken as a result to the applicants, the Environmental Commissioner and any other person who has received previous notice.

How to Use the Request for Review Provisions of the EBR

Obtain the form

Telephone or write the Environmental Commissioner for a Application for Review form. Applications are confidential: the names, addresses or other information about the applicants may not to be given out by the minister.

Information needed to complete the form:

- ❖ the names and addresses of the two applicants (who must be residents of Ontario);
- ❖ an explanation why the applicants believe a review is appropriate;
- ❖ a summary of the evidence or information that supports this belief;
- ❖ clear identification of the policy, Act, regulation or instrument whose review is sought.

Submit an application for review

The form must be forwarded to the Office of the Environmental Commissioner. (See page 9 for a description of the Office, its function and address.)

The response of the government

The Environmental Commissioner or the minister must give notice if the application concerns an Act, regulation, or instrument not prescribed under the EBR. If you receive such a notice, you can still forward your comments to the appropriate minister for consideration. However, the review requirements of the EBR do not apply.

If the minister grants the application for review, you will be notified and informed what actions have or will be taken.

Requesting an Investigation

What the EBR does

There's black smoke spewing from a chimney, or an oil slick on the water, or an offensive odour in the air. What can you do if you suspect someone or something may be harming the environment? You have always had the right to ask the relevant ministry to investigate the problem. However, you had little recourse if you felt the government's response was slow, inadequate or, otherwise, unsatisfactory.

The EBR provides a formal procedure for requesting an investigation if you think someone is breaking an environmental law. The ministry is then under an obligation to review the application and, if certain criteria are met, undertake the investigation. (The ministry is allowed some discretion in ensuring that requests for investigations are warranted.) It must also inform you of the results of the investigation and any action that will be taken.

The request for an investigation provisions are found in Part V of the EBR, Sections 74 to 81.

Contact your ministry office first

The normal mechanisms for reporting environmental problems remain in effect. Residents are urged to contact the local Ministry of Environment and Energy office or the MOEE spill hotline (1-800-268-6060) with a complaint or concern. Callers should expect a prompt and proper response. However, if such an approach has been attempted and the results proven unsatisfactory, the EBR allows a formal application for investigation to be filed through the Office of the Environmental Commissioner.

When things go wrong: Your Right to Request an Investigation

Step 1, Apply for an investigation

Any two persons resident in Ontario can apply for an investigation if they believe that an Act, regulation or instrument subject to the EBR has been contravened.

Step 2, Submit an application to the Environmental Commissioner

The two applicants must fill out the applications for an investigation provided by the Office of the Environmental Commissioner. Once completed, the application is submitted to the Commissioner.

Step 3, Application referred to the appropriate ministry

Within 10 days of receiving the application, the Environmental Commissioner must refer it to the minister responsible for the administration of the statute under which the contravention is alleged to have been committed.

Step 4, Minister acknowledges receipt

Within 20 days of receiving it from the Environmental Commissioner, the minister must acknowledge receipt of the application to the applicants.

Step 5, Minister decides whether or not to investigate

The minister must investigate all matters to the extent considered necessary in relation to the contravention alleged in the application. However, the minister does not have to investigate if:

- ❖ the application is frivolous or vexatious;
- ❖ the alleged contravention is not serious enough to warrant an investigation;
- ❖ the alleged contravention is not likely to harm the environment; or
- ❖ there is already an on-going or completed investigation.

Step 6, Notification of a decision not to proceed

If the minister decides not to investigate, notice of the decision, together with a brief statement of the reasons, must be given to the applicants, any person alleged in the application to have been involved in the commission of the contravention, and the Environmental Commissioner. This notice must be given within 60 days of receiving the application. Notice is not required if an investigation is on-going.

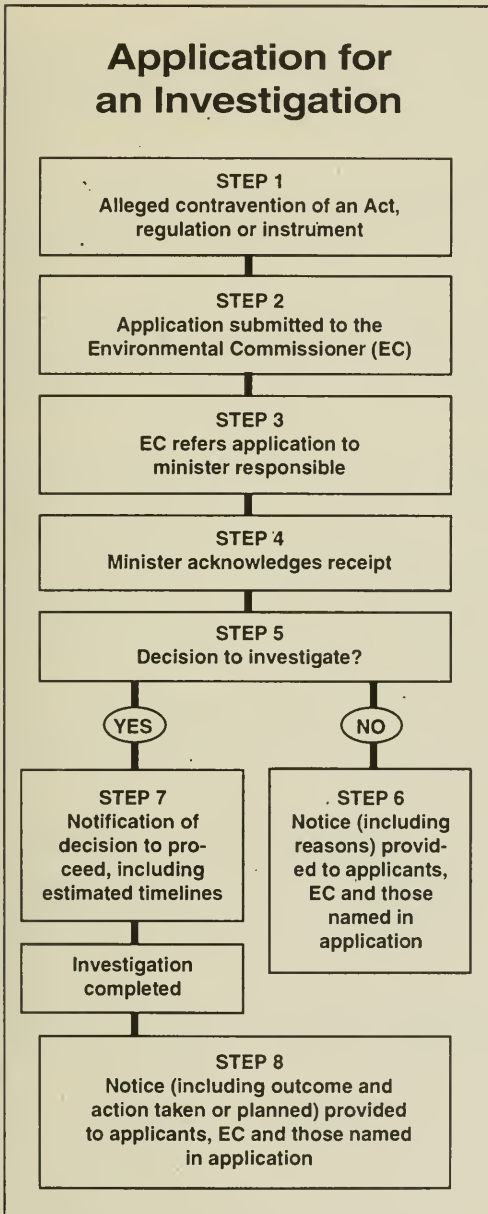
Step 7, Notification of a decision to proceed

Where a decision has been made to proceed, and within 120 days of receiving an application for an investigation, the minister shall either complete the investigation or give the applicants a written estimate of the time required to complete it.

Step 8, Minister announces the results

Within 30 days of completing the investigation, the minister must give notice of the outcome of the investigation (including what action, if any, has or will be taken as result of the investigation) to the applicants, any person alleged in the application to have been involved in the commission of the contravention, and the Environmental Commissioner.

Application for an Investigation



How to Apply for an Investigation under the EBR

First step, get the form

Telephone or write the Environmental Commissioner for an Application for an Investigation form. Applications are confidential; your name, address or other information may not be given out by a minister or the Environmental Commissioner. However, the names of applicants may be made available if the issue proceeds to the courts.

Information needed to complete the form:

- ❖ the names and addresses of the applicants;
- ❖ a statement of the nature of the alleged contravention;
- ❖ the name and address of each person alleged to have been involved in the commission of the contravention to the extent such information is available;
- ❖ a summary of the evidence supporting the allegation;
- ❖ the name and address of each person who might be able to give evidence about the alleged contravention, together with a summary of the evidence they might give;
- ❖ a description of any document or other material that the applicants believe should be considered in the investigation;
- ❖ details of any previous contacts with the office of the Environmental Commissioner or any ministry regarding the alleged contravention.

Form must be sworn to be true

Once the form is completed, it must be taken to a lawyer or commissioner and an affidavit completed in which you swear or solemnly affirm that you believe that the facts alleged in the application are true. Applicants who knowingly make false statements run the risk of being penalized.

Submit an application for investigation

The form must be forwarded to the Office of the Environmental Commissioner (see page 9 for information on that Office, its functions and address).

Your Right to Sue

What the EBR does

Despite all our attempts to prevent or eliminate environmental problems, sometimes things go wrong anyway. In such instances, the last resort available may be to seek remedy in the courts.

In the past, however, this option was simply not available to most of us. Members of the public did not have the "standing" or status to sue those that degraded the environment unless our health or property were directly affected. For example, if someone cut down the trees in your public park, discharged untreated sewage into the lake, or dumped garbage on public lands, your only recourse would have been to lodge a complaint with your local Ministry office.

The EBR provides a clearly-defined opportunity for the public to sue those causing harm to a public resource. However, there are still limits. A lawsuit is only permitted where: there is an allegation that an environmental law is being broken; a public resource is being harmed or threatened; and a request for an investigation has already been submitted.

Despite these constraints, the new cause of action in the EBR is intended to ensure that the public can take action in the courts as a measure of last resort.

This mechanism is found in Part VI of the EBR, Sections 82 to 103.

The Right to Sue: Using the Courts, as a Last Resort

Step 1, General rules

Any resident of Ontario may bring an action in court where it can be established that some person has or is about to imminently contravene a prescribed Act, regulation or instrument, and that the contravention has or imminently will cause significant harm to public resource in Ontario. Before this right can be exercised, there are a number of preconditions that must be met (note, preconditions 1 and 2 may not apply in the case of an emergency):

❖ Precondition #1 — The Need to Request an Investigation

Before one can bring a lawsuit, the plaintiff (the person bringing the action) must have applied for an investigation into the contravention under Part V of the EBR, and either has not received a response within a reasonable time or has received a response that is not reasonable.

❖ Precondition #2 — Farm Practices Protection Act

An action cannot be brought concerning the odour, noise or dust resulting from an agricultural operation unless the Farm Practices Protection Board, under the *Farm Practices Protection Act*, has already considered and disposed of the application.

❖ Precondition #3 — Limitation Period

Even if the other preconditions are met, no person can bring an action more than two years after the earliest of: first learning that the harm had occurred and was caused by the contravention; the time in which a reasonable person ought to have known of the contravention; or public notice of an action respecting the same matter.

Step 2, Place a notice on the Environmental Registry

Once the lawsuit is launched, the plaintiff must notify the Environmental Commissioner who will place the notice on the Environmental Registry. The court may also order other avenues of notice (see Step 4, below).

Step 3, Inform the Attorney General

The plaintiff must inform the Attorney General (by serving the lawsuit documents on the Attorney General) not later than 10 days after such documents are served on the first defendant. The Attorney General is entitled to present evidence and make submissions to the court in the action, to appeal from judgment, and to present evidence and make submissions in such an appeal.

Step 4, Provide additional notice

Within 30 days of filing all official papers (pleadings), the plaintiff is required to ask the court for instructions as to the nature and timing of any additional notice, if any, that is ordered.

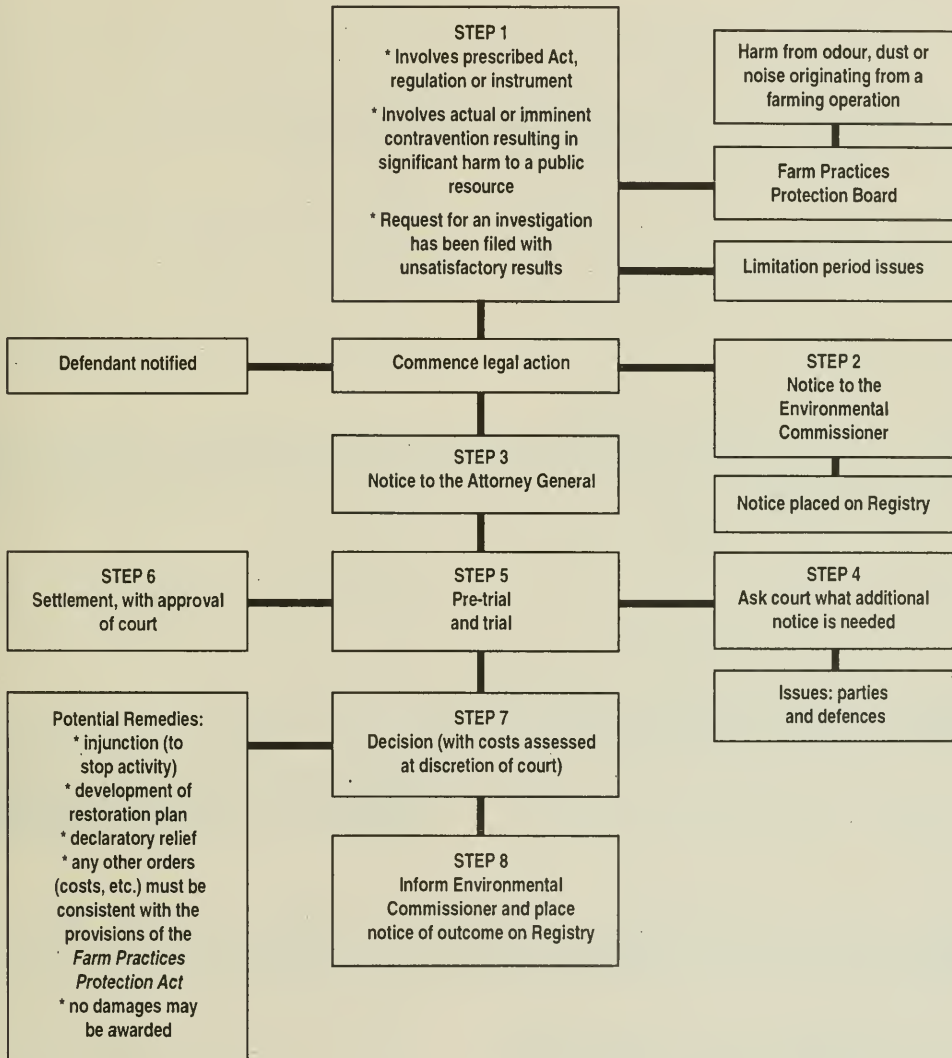
Step 5, Pre-trial and trial issues

The EBR outlines a number of specific provisions relevant to the pre-trial and trial, including: parties to the lawsuit, defences, and powers of the court.

Parties to the lawsuit

The court may permit any person to participate in the action, as a party or otherwise, in order to provide fair and adequate representation of the public and private interests.

Your Right to Sue to Protect a Public Resource



Your Right to Sue

Defences

The defendant (the person defending the action) is granted a number of defences. There is no contravention if the defendant satisfies the court that:

- ❖ the defendant exercised due diligence in complying with the Act, regulation or instrument;
- ❖ the act or omission alleged to be a contravention is authorized by a provincial or federal statute, regulation or instrument; or
- ❖ the defendant complied with an interpretation of the instrument that the court considers reasonable.

Powers of the Court

The court may stay or dismiss the action if to do so would be in the public interest. In making this decision, the court can consider:

- ❖ environmental, economic and social concerns;
- ❖ whether the issues would be better resolved by another process;
- ❖ whether there is an adequate government plan to address the public interest issues raised by the proceedings.

Step 6, A settlement is not binding unless it has been approved by the court.

Step 7, Decisions and court-ordered remedies

If the court finds that there is a contravention, it may:

- ❖ grant an injunction against the contravention
- ❖ order the parties to negotiate a "restoration plan";
- ❖ grant declaratory relief; or
- ❖ make any other order the court considers appropriate.

To the extent that it is reasonable, practical and ecologically sound, a restoration plan must provide for:

- ❖ the prevention, diminution or elimination of harm;
- ❖ the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention;
- ❖ the restoration of all uses affected by the contravention.

The court must approve any restoration plan and this approval will be based upon the criteria stated in the Act. If the parties cannot agree on a restoration plan, or if the one proposed does not meet the EBR criteria, the court must develop a restoration plan consistent with such criteria.

Step 8, Assessing the costs of a lawsuit

In exercising its discretion over whether the losing party should have to pay the winner's costs, the court may consider any special circumstances, including whether the action is a test case or raises a novel point of law.

Note, under the EBR's new right to sue, an individual can go to court only to protect a public resource and may not receive personal awards or compensation for damages. (Damages may be recovered, however, under the public nuisance amendments in the Act.)

How to Use Your Right to Sue Provisions under the EBR

Preliminary considerations

The right to sue provisions in the EBR involves the court process. At this point, it is important to decide whether or not legal advice should be sought to pursue the matter. The following discussion is just a summary of what might be needed and expected. It should not be considered legal advice.

Draft the pleadings

The pleadings are the formal court documents which outline the plaintiff's allegations. The facts which will be relied upon are found in the statement of claim. In addition to the usual requirements, the statement of claim must establish that:

- ❖ someone is, or will imminently, contravene a prescribed law;
- ❖ the harm alleged is to a "public resource" and is significant;
- ❖ you have requested an investigation and the investigation was not undertaken in a reasonable time or manner, or delay would result in significant harm to public resource.

Serve and file the documents

To initiate an action, a statement of claim is filed with the Ontario Court (General Division) in your locality. This document must be given personally to the parties you are suing. This is called service of documents.

Follow court rules

It must be remembered that this is a lawsuit, and the civil rules of practice apply, including the usual litigation mechanisms:

- ❖ discovery, where litigants can question parties and require that they produce documents in their possession;
- ❖ pre-trial hearings;
- ❖ trial, where examination and cross-examination occurs.

Key EBR Definitions

Court:

The Ontario Court (General Division),
but does not include the Small Claims Court

Public Resource:

Means (a) air; (b) water, not including water in a body of water the bed of which is privately owned and on which there is no public right of navigation; (c) unimproved public land; (d) any parcel of public land that is larger than five hectares and is used for: (i) recreation; (ii) conservation; (iii) resource extraction; (iv) resource management; or (v) a purpose similar to one mentioned in subsections (i) to (iv); or (e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d)

How does the Environmental Bill of Rights Affect Your other Environmental Rights?

How does the EBR affect the existing rights Ontario residents have to protect the environment? As explicitly stated in the EBR, the rights created under the Act do not diminish any existing rights. The EBR only augments or enhances existing legal rights, such as the opportunity to launch a class action suit. For example, although the EBR creates a civil action based on a breach of an environment statute, one can still bring a private prosecution in criminal court. A short review of how the EBR relates to existing environmental rights follows below.

Public Nuisance

What is public nuisance?

In our legal system, you can bring an action in court against anyone who is causing harm to your property and your health. In an environmental context, if someone is affecting your health or your property, it is possible to bring a lawsuit, as long as all the usual requirements of a lawsuit are met. In past cases where the offending activity affected the whole community, private action might not have been permitted if the problem was deemed a "public wrong" rather than "private wrong." This "public nuisance rule" stated that individuals could not sue unless they suffered an injury different in kind or degree.

How does the EBR affect public nuisance?

The EBR effectively removes the public nuisance barrier to the courts. Section 103 states that access to the courts will not be barred solely on the grounds that you cannot show your injury is different in kind or degree. So long as you can show a direct economic or personal loss, a lawsuit in the normal course can be maintained.

Class Actions

What are class actions?

Under the *Class Proceedings Act, 1992* it is now possible in Ontario to bring a class action. This means that a person can go to court and represent not only their own claim, but all the people in the province that have a similar claim. Of course, all the particulars in law have to be satisfied.

How does the EBR affect class actions?

Presumably, one can combine the class action law with the kind of environment-related personal injury action that was formerly barred by the public nuisance constraints. However, the EBR right to sue for the protection of a public resource cannot be combined with the class action law; the EBR specifically excludes the operation of the class action law with the new right of action.

Costs

What are costs?

In court cases, the loser may have to pay the legal costs of the winning litigant. This rule applies to most litigation in the province. The "loser pays" rule is an inherent brake on frivolous litigation, especially in light of the substantial costs of litigation.

How does the EBR affect costs?

Under the EBR, the "loser pays" rule is maintained. However, the court is given discretion whether to apply the rule under special circumstances, including in cases where an action is considered to be a test case or raises a novel point of law.

Intervenor Funding

What is intervenor funding?

In 1989, the province brought in new legislation that allowed intervenors (those appearing before a tribunal) to ask for money to assist in the intervention. The *Intervenor Funding Project Act* only applies to designated tribunals.

How does the EBR affect intervenor funding?

The EBR does not affect the *Intervenor Funding Project Act*. However, it should be noted that neither the Environmental Appeal Board, which hears appeals of instruments (see pages 18-19), nor the Ontario Labour Relations Board, which deals with employer reprisals (see page 28), are included within the scope of the *Intervenor Funding Project Act*.

Protection from Reprisal

What the EBR says

Environmental protection is everyone's concern. No one should be penalized for taking advantage of their new rights to help protect the environment as provided under the EBR. Employees, however, may find themselves in a vulnerable position if they exercise the rights afforded by the EBR, especially when their employer is involved. Many employees may not want to "blow the whistle" on what they consider an illegal activity for fear of reprisal by their employer.

It is for this reason that the EBR provides special protections for employees. Once a complaint of reprisal is filed, it is up to the employer to establish that no such reprisals were taken against the employee on any prohibited grounds.

The employee reprisal provisions are found in Part VII of the EBR, Sections 104 to 116.

How to file a complaint

The first step is to file a complaint with the Ontario Labour Relations Board. This complaint must provide all the basic information required by the Act. Once completed, the complaint should be forwarded to the:

Ontario Labour Relations Board

400 University Ave., 4th floor,
Toronto, Ontario M7A 1T7
Telephone: 416-326-7500
Fax: 416-326-7531

Whistle Blowing and Employer Reprisals

Step 1, General rules

Employees that expose the environmentally-harmful actions of their employers are known as "whistle blowers," and cannot be subjected to job-related reprisals for their actions. The EBR expands whistle blower protections, currently found in some legislation, to the 20 statutes prescribed under the Act.

Any person can file a written complaint with the Ontario Labour Relations Board alleging that an employer has taken "reprisals" against an employee on a "prohibited ground." In this context, reprisal means that the employer has or attempted to dismiss, discipline, penalize, intimidate, or harass an employee.

Step 2, Rights of employees

An employer has taken reprisals on a "prohibited ground" if such reprisal was taken because the employee, in good faith, did or may:

- ❖ participate in the decision-making process in connection with a policy, Act, regulation, instrument or SEV under Part II of the EBR;
- ❖ apply for a review of a policy, Act, regulation or instrument under Part IV of the EBR;
- ❖ apply for an investigation under Part V of the EBR;
- ❖ seek the enforcement of a prescribed Act, regulation or instrument;
- ❖ give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument; or
- ❖ give evidence in a proceeding under the EBR or an Act prescribed under the EBR.

Step 3, Role of the labour relations officer

The Ontario Labour Relations Board may authorize a labour relations officer to inquire into a complaint. If so, the officer must do so as soon as reasonably possible and attempt to settle the matter. The officer then reports back to the Board. If the labour relations officer either cannot settle the matter, or the Ontario Labour Relations Board decides to dispense with the officer inquiry, the Board may inquire directly into the complaint.

Step 4, Role of the Labour Relations Board

Where the Board undertakes the inquiry, the onus is on the employer to prove that he or she did not take reprisals on a prohibited ground.

Step 5, Where a reprisal has occurred

If the Board should find that there has been a reprisal, it can determine what the employer should do to rectify the situation. Among other options, the Board could order the employer to cease any harassing action or to reinstate the employee, with or without compensation.

Step 6, Enforcing the decision

If the employer does not follow the Board decision or a signed settlement agreement, the complainant is to notify the Board. The Board must file its decision with the Ontario Court (General Division) and the determination may be enforced as if it were an order of the court.

For information on the
Environmental Bill of Rights, contact:

Office of the Environmental Commissioner
1075 Bay Street, Suite 605,
Toronto, Ontario M5S 2B1
Telephone: (416) 325-3377
Fax: (416) 325-3370

For additional copies, please write:

Ministry of Environment and Energy
Public Information Centre,
135 St. Clair Avenue West,
Toronto, Ontario M4V 1P5
Telephone: (416) 323-4321 or 1-800-565-4923
Fax: (416) 323-4564



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Une version française de ce document sera disponible.

